

FILE COPY

SUPREME COURT OF THE UNITED STATES

DOCKETED WITH NO

No. 457

TWIN FALLS CANAL COMPANY, a Corporation,

HAROLD H. JOHNSON, NORTH AMERICAN MORT-
GAGE COMPANY, a Montana Corporation; GEORGE
HERBERT JOHNSON AND MARTHA ELMINA
JOHNSON, HUSBAND AND WIFE

PETITION FOR WRIT OF HABEAS CORPUS TO THE
SUPREME COURT OF IDAHO AND PRAY IN
SUPPORT THEREOF

JAMES E. BOWEN,

Counsel for Petitioner.

INDEX

SUBJECT INDEX

| | Page |
|--|------|
| Petition for Writ of Certiorari: | |
| Summary Statement of Matter Involved..... | 1 |
| Reasons Relied on for the Allowance of the Writ | 8 |
| Brief in Support of Petition for Writ of Certiorari: | |
| I. Opinions of the Courts..... | 11 |
| II. Jurisdiction | 12 |
| III. Statement of the Case..... | 14 |
| IV. Specification of Errors | 14 |
| V. Summary of Argument | 15 |
| Argument | 15 |
| (Point "A") | 21 |
| (Point "B") | 22 |
| Conclusion | 29 |

TABLE OF CASES CITED

| | |
|--|--------|
| <i>Caldwell v. Taggart</i> , 29 U. S. 190..... | 8, 19 |
| <i>Commonwealth Trust Co. of Pittsburgh v. Smith</i> , 266 U. S. 152 | 8, 18 |
| <i>Crescent City L. S. L. & S. H. Co. v. Butchers' Union et al.</i> , 120 U. S. 141..... | 13, 22 |
| <i>Cresswill v. Grand Lodge Knights of Pythias of Ga. et al.</i> , 225 U. S. 246-261..... | 14, 22 |
| <i>Cumberland Glass Mfg. Co. v. Charles DeWitt</i> , 237 U. S. 447-449 | 14, 22 |
| <i>Des Moines Nav. & R. Co. v. Iowa Homestead Co.</i> , 123 U. S. 552 | 13, 22 |
| <i>Donohue v. Vosper</i> , 243 U. S. 59-66..... | 14, 17 |
| <i>Dupasseeur v. Rochereau</i> , 88 U. S. 130-138..... | 13, 22 |
| <i>First National Bank of Hailey v. Bews, et al.</i> , 3 Idaho 486, 31 P. 816 | 20 |
| <i>Garzot v. De Rubio</i> , 209 U. S. 283-306..... | 8, 18 |
| <i>Motlow v. Missouri</i> , 295 U. S. 97, 98..... | 14, 22 |

| | Page |
|--|--------|
| <i>Pittsburg C. C. & St. L. R. Co. v. Long Island Loan & Trust Co.</i> , 172 U. S. 493 | 13, 22 |
| <i>Shields v. Barrow</i> , 58 U. S. 130 | 8 |
| <i>Stearns v. Graves</i> , 61 Idaho 232, 99 Pac. (2d) 955 | 20 |
| <i>Stoll v. Gottlieb</i> , 305 U. S. 165, 177 | 13, 17 |
| <i>Swift v. McPherson</i> , 232 U. S. 51-55 | 14, 22 |
| <i>West Side Belt R. R. Co. et al. v. Pittsburgh Const. Co.</i> , 219 U. S. 92-100 | 14, 22 |

TABLE OF STATUTES CITED

| | |
|---|--------|
| Sec. 237(b) of the Judicial Code, 28 U. S. C. A. | 12 |
| Sec. 344(b) | 12, 22 |
| Idaho Code Annotated: | |
| Sec. 5-313 | 19, 20 |
| Sec. 5-324 | 19 |

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 487

TWIN FALLS CANAL COMPANY, A CORPORATION,
Petitioner,

vs.

HAROLD H. JOHNSON, NORTH AMERICAN MORT-
GAGE COMPANY, A MONTANA CORPORATION; GEORGE
HERBERT JOHNSON AND MARTHA ELMINA
JOHNSON, HUSBAND AND WIFE

**PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF IDAHO AND BRIEF IN
SUPPORT THEREOF.**

To the Honorable the Supreme Court of the United States:

Your petitioner respectfully shows:

I

Summary Statement of Matter Involved

This is a suit in equity brought in the District Court of
Cassia County, Idaho, by respondents herein against peti-
tioner herein to enjoin petitioner from so operating Milner

Dam and Milner Lake in the diversion of water from Snake River as to cause injury to and ultimate destruction of lands owned by respondents, which border on the Lake (R. 8-10).

Respondents allege in their amended complaint that petitioner is the owner of an undivided 6/11ths interest in Milner Dam and is wholly burdened with and has the exclusive control, management and operation of said dam; that the dam is used as a diversion dam from which the irrigation waters of petitioner and other irrigation units are drawn for delivery to ultimate users; that Milner Lake is formed by waters impounded above the dam; that by reason of the manner of operation and use of Milner Dam, the water level of the lake from April until November is higher than for the remainder of the year; that during the irrigation season of 1936 the waters of the lake were raised and washed upon and over and eroded and washed away approximately two acres of respondents' land. Similar allegations follow for the years 1937 to 1940 inclusive. It is alleged further that for many years last past the waters of Milner Lake by reason of the operation of Milner Dam and Milner Lake as aforesaid, washed upon and over and eroded away approximately two acres of land each year; that in the future petitioner will continue to operate Milner Dam and Milner Lake in the manner aforesaid which will erode and wash away said real estate to the irreparable injury, damage and destruction of the same, unless petitioner is enjoined from so doing by the Court; that in order to avoid bringing a multiplicity of suits for the recovery of damages, it is necessary for the Court to grant injunctive relief. Respondents pray that petitioner be permanently and perpetually enjoined from operating and using Milner Dam and Milner Lake in the manner as set forth in the amended complaint (R. 3-10).

Petitioner's answer places in issue the allegations of the amended complaint.

As a first affirmative defense, it is alleged that at all times herein mentioned the North Side Canal Company, Limited, was and now is a corporation organized and existing under and by virtue of the laws of the State of Idaho, and the American Falls Reservoir District No. 2 at all times since June 30, 1928, was an irrigation district organized and existing under the laws of Idaho with its principal place of business at Gooding, Idaho; that on or about December 29, 1915, petitioner became the owner of an undivided 6/11ths interest in Milner Dam and the rights-of-way for flowage of Milner Lake, and the said North Side Canal Company, Limited, a corporation, became the owner of an undivided 5/11ths interest in said dam and lake rights-of-way, all of which more fully appears by a decree entered in the District Court of the United States in and for the District of Idaho, Southern Division, in an action entitled Twin Falls Canal Company, a corporation, Plaintiff, vs. Twin Falls Land and Water Company, a corporation, and North Side Canal Company, Limited, a corporation, Defendants, under date December 29, 1915, copy of which decree is annexed marked Petitioner's Exhibit "A" and made a part hereof; that a supplemental judgment was entered in said action on March 25, 1919, requiring the water in the Forebay of Milner Lake to be held at or about the depth of 11 feet above the sills of the waste-gates, a copy of said judgment marked Petitioner's Exhibit "B" is annexed and made a part hereof; that on or about June 30, 1928, said North Side Canal Company, Limited, a corporation, entered into a contract with said American Falls Reservoir District No. 2 under the terms of which said district acquired an undivided 1/11th interest in and to said Milner Dam and rights-of-way for Milner Lake described in petitioner's amended complaint; that said district has been the owner and in possession of said 1/11ths undivided interest in and to said dam and appurtenant rights-of-way since that date; that at all times

since on or about March 1, 1905, the predecessor in interest of petitioner and petitioner have utilized Milner Dam and Milner Lake to divert water on the South Side of Snake River for irrigation and for domestic use; that at all times since prior to December 29, 1915, the said North Side Canal Company, Limited, has utilized said dam and lake to divert water on the North Side of Snake River for irrigation and for domestic use; that since on or about June 30, 1928, American Falls Reservoir District No. 2 has utilized said dam and lake to divert water for irrigation and domestic use; that the rights of petitioner and the North Side Canal Company, Limited, to use said dam and lake as aforesaid, were and have been at all times since December 29, 1915, confirmed and established by decree of the United States District Court for the District of Idaho, Southern Division, as more fully appears by Petitioner's Exhibit "A" attached hereto and made a part hereof; that the right of said American Falls Reservoir District No. 2 since June 30, 1928, has been established by conveyance of a 1/11th interest from the said North Side Canal Company, Limited. It is further alleged that there has been no change in the elevation of the water of Milner Lake since on or about March 25, 1919, when as shown by the judgment, Exhibit "B" annexed hereto, it was directed that the water in the Forebay of Milner Dam should be held at or about the depth of 11 feet above the sills of the waste-gates; that petitioner has at no time since on or about March 25, 1919, required the water elevation in Milner Lake to be held above 10.3 feet in depth above the sills of the waste-gates; that the elevation above 10.3 feet, or approximately 11 feet, at which depth the water has been held, has been for and used by the said North Side Canal Company, Limited, and the said American Falls Reservoir District No. 2 during the time that it has owned an interest in said dam and lake.

It is further alleged that under the terms of said decree, Petitioner's Exhibit "A", and ownership, petitioner herein has no supervision or control over the intake gates of the said North Side Canal Company, Limited, or of the said American Falls Reservoir District No. 2; that the management and control of the said Milner Dam vested and placed in the defendant herein, is in furtherance of the joint use of said dam by petitioner and the said North Side Canal Company, Limited, a corporation, in accordance with the terms of said decree, Exhibit "A", which provides that said dam shall be forever held, owned and used by said companies for the purpose of checking and impounding the water flowing in Snake River in accordance with the separate rights of the respective parties; that the only control which petitioner has over said dam, or the operation thereof, is that it is responsible for the proper maintenance and safeguarding of said dam; that if respondents have been damaged, as alleged in the amended complaint, said loss was occasioned by the operation of Milner Lake during said years by the said North Side Canal Company, Limited, and by the said American Falls Reservoir District No. 2, and for their benefit; that if an injunction is granted, as prayed for in the amended complaint, the rights of said North Side Canal Company, Limited, and the said American Falls Reservoir District No. 2 will be directly affected; that the controversy between respondents and petitioner cannot be determined without prejudice to the rights of the said North Side Canal Company, Limited, and the said American Falls Reservoir District No. 2, or by waiving their rights; that a complete determination of the controversy cannot be had without the presence of said North Side Canal Company, Limited, and the said American Falls Reservoir District No. 2 as parties defendant herein (R. 36-39).

As a second affirmative defense, it is alleged that the right of flowage is established by deed from the predeces-

sor-in-interest of respondents, to the predecessor-in-interest of petitioner, copy of which is marked Petitioner's Exhibit "C" and annexed hereto.

As a third affirmative defense it is alleged that the right of flowage has been established by adverse user.

As a fourth affirmative defense, estoppel is plead.

For a fifth, sixth and seventh affirmative defense, that the action is barred by the statutes of limitation (R. 40-44).

Motion to bring in the North Side Canal Company, Limited, a corporation, and the American Falls Reservoir District No. 2, an irrigation district, as additional parties defendant, was over-ruled by the District Court (R. 13).

The case proceeded to trial against petitioner alone. Findings of Fact, Conclusions of Law and Decree were entered in favor of respondents and against petitioner (R. 14-29).

The judgment provides in part:

"It is ordered, adjudged and decreed, that the defendant (petitioner herein), Twin Falls Canal Company, a corporation, its servants, agents and employees, together with the successors and assigns in interest, be and they are hereby permanently and perpetually enjoined and restrained from operating and using Milner Dam and Milner Lake and each of them in such a manner as to cause the water of said Milner Lake to continue to wash upon and over and to erode and wash away the following described real estate situated in Cassia County, State of Idaho, to wit:

(then follows description of land,)

"* * * and from raising the waters of said Milner Lake in such manner as to cause the waters of said Milner Lake to continue to wash upon and over, and to erode and wash away the above described real estate or in anywise to destroy said lands or any portion thereof.

"It is further ordered, adjudged and decreed that the Clerk of the above entitled Court issue under the seal of said Court a permanent injunction in the above entitled action, addressed to said defendant (petitioner herein), permanently and perpetually enjoining said defendant as herein provided, and that a copy of said injunction be served on said defendant herein. * * * Dated this 7th day of June, 1944, T. Bailey Lee, District Judge." (R. 27-29.)

During the course of the trial, respondents offered in evidence, which was admitted without objection, plaintiffs' (respondents herein) Exhibit "K", which is a copy of the decree entered in the District Court of the United States for the District of Idaho, Southern Division, in the action entitled Twin Falls Canal Company, a corporation, Plaintiff, vs. Twin Falls Land and Water Company, a corporation, Twin Falls North Side Land and Water Company, a corporation, and North Side Canal Company, Limited, a corporation, Defendants; copy of which decree is attached to Petitioner's Answer as Exhibit "A" (R. 45).

Appeal was perfected to the Supreme Court of the State of Idaho from the permanent injunction granted by the District Court (R. 29-30).

The Supreme Court of Idaho affirmed the judgment of the District Court of Cassia County (R. 53).

Petition for Rehearing was denied (R. 70).

The principal questions involved on said appeal were:

A. The construction and effect to be given to the Federal decree, Petitioner's Exhibits "A" and "B", attached to the Answer.

B. Construction of a deed for right-of-way of flowage, Petitioner's Exhibit "C" attached to the Answer.

C. Adverse user, estoppel and statutes of limitation.

II

Reasons Relied On for the Allowance of the Writ

1. The said Supreme Court of the State of Idaho, in said case, decided the Federal question of substance as to indispensable parties in favor of respondents herein, by holding that respondents could proceed with their action against petitioner to enjoin petitioner from holding the water level of Milner Lake at or about 11feet in depth above the sills of the waste-gates of Milner Dam, contrary to the mandatory injunction contained in the decree of the United States District Court for the District of Idaho, Southern Division, in the case of Twin Falls Canal Company, a corporation, Plaintiff, vs. Twin Falls Land and Water Company, a corporation, Twin Falls North Side Land and Water Company, a corporation, and North Side Canal Company, Limited, a corporation, Defendants, dated December 29, 1915, and supplemental judgment, March 25, 1919; and without requiring respondents to bring into the case as additional parties defendant the North Side Canal Company, Limited, a corporation, and American Falls Reservoir District No. 2, an irrigation district, who are the owners of an undivided 5/11ths interest in Milner Dam and the rights-of-flowage of Milner Lake, and for whose benefit the water level of Milner Lake was held at an elevation in excess of 10.3 feet above the sills of Milner Dam; and thereby denying due effect to said decree of said Federal Court, which decision is not in accord with the decisions of this Court, including the cases of *Caldwell v. Taggart*, 29 U. S. 190, 4 Pet. 190, 7 L. Ed. 828; *Shields v. Barrow*, 58 U. S. 130, 17 How. 130, 15 L. Ed. 158; *Commonwealth Trust Co. of Pittsburgh v. Smith*, 45 S. Ct. 26, 266 U. S. 152, 69 L. Ed. 219, affirming C. C. A. 273 F. 1; and *Garzot v. De Rubio*, 209 U. S. 283-306 at p. 297.

Wherefore, your petitioner prays that a Writ of Certiorari issue under the seal of this Court directed to the Supreme Court of the State of Idaho commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Supreme Court had in the case numbered and entitled on its docket: No. 7209, Harold H. Johnson, North American Company, a Montana Corporation, George Herbert Johnson and Martha Elimina Johnson, husband and wife, Plaintiffs-Respondents, v. Twin Falls Canal Company, Defendant-Appellant, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of said Supreme Court of the State of Idaho be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated this 23d day of July, 1946.

JAMES R. BOTHWELL,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 487

**TWIN FALLS CANAL COMPANY, A CORPORATION,
PETITIONER AND APPELLANT BELOW,**

VS.

**HAROLD H. JOHNSON, NORTH AMERICAN MORT-
GAGE COMPANY, A MONTANA CORPORATION; GEORGE
HERBERT JOHNSON AND MARTHA ELMINA
JOHNSON, HUSBAND AND WIFE, RESPONDENTS AND APPEL-
LEES BELOW**

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

I

Opinions of the Courts

The findings of fact and conclusions of law and decree of District Court appear at R. 14-29; the opinion of the Supreme Court of Idaho appearing at R. 56-69, is reported 167 P. (2d) 834, advance sheets published May 10, 1946.

Jurisdiction

1. The decision of the Supreme Court of Idaho was filed February 23, 1946 (R. 55). Petition for Rehearing was filed March 13, 1946 (R. 70). Petition for Rehearing was denied by the Supreme Court of Idaho, April 22, 1946 (R. 70). Judgment of the Supreme Court of Idaho was entered April 22, 1946; Remittitur mailed to Clerk of District Court, April 23, 1946; Judgment received and filed April 25, 1946 (R. 70, 53). An order Extending the Time to Apply for Writ of Certiorari to September 10, 1946, was entered by Mr. Justice Hugo L. Black on July 3, 1946 (R. 71).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Sec. 237 (b) of the Judicial Code, 28 U. S. C. A. Sec. 344 (b).

3. Basis for Jurisdiction: Respondents' suit is for a permanent injunction against petitioner operating Milner Dam and Milner Lake to divert water from Snake River by holding the lake level approximately 11 feet above the sills of the waste-gates at Milner Dam (R. 57). Petitioner replies that its conduct in the operation of Milner Dam is regulated by decree of the United States District Court for the District of Idaho, Southern Division, dated December 29, 1915, by which it is decreed that petitioner is the owner of an undivided 6/11ths interest in said dam; that the North Side Canal Company, Limited, is the owner of an undivided 5/11ths interest in said dam; and that said company sold an undivided 1/11th interest in said dam to American Falls Reservoir No. 2; that under the terms of said decree, petitioner has no control over the intake gates or diversion works of the said North Side Canal

Company, Limited, or the said American Falls Reservoir District No. 2; that the only control which petitioner has over the dam under the terms of the decree is to safeguard the dam against loss or damage; that the elevation of the water level above 10.3 feet in depth above the sills of the waste-gates of Milner Dam is for the use and benefit of the North Side Canal Company, Limited, and the American Falls Reservoir No. 2. After setting forth the defense of defect of parties defendant, petitioner moved to bring in the necessary parties, the North Side Canal Company, Limited, and American Falls Reservoir District No. 2 (R. 58-59); this the Court refused to do (R. 62) and petitioner finds itself now in this dilemma: under the Federal decree the water is required to be held at or about the 11 foot level above the sills of the waste-gates at Milner Dam (R. 48-49); under the injunction in this suit, petitioner is enjoined from holding the water to a depth of at or about 11 feet above the sills of the waste-gates in Milner Dam, because it overflows and erodes respondents' lands and petitioner can not comply with both decrees at the same time (R. 29).

4. Cases believed to sustain the jurisdiction of this Court are as follows:

Stoll v. Gottlieb, 305 U. S. 165-177, 83 L. Ed. 104;

Dupasseur v. Rochereau, 21 Wall 130, 134, 88 U. S. 130-138, 22 L. Ed. 588, 590;

Crescent City L. S. L. & S. H. Co. v. Butchers' Union S. H. & L. S. L. Co., 120 U. S. 141, 142, 30 L. Ed. 614, 615, 7 S. Ct. 472;

Des Moines Nav. & R. Co. v. Iowa Homestead Co., 123 U. S. 552, 559, 31 L. Ed. 202, 205, 8 S. Ct. 217;

Pittsburgh, C., C. & St. L. R. Co. v. Long Island Loan & T. Co., 172 U. S. 493, 607, 43 L. Ed. 528, 532, 19 S. Ct. 238;

Motlow v. Missouri, 295 U. S. 97, 98, 79 L. Ed. 1327, 1328, 55 S. Ct. 661;
West Side Belt R. R. Co. et al. v. Pittsburgh Const. Co., 219 U. S. 92-100, 55 L. ed. 107;
Cresswill v. Grand Lodge Knights of Pythias of Ga. et al., 225 U. S. 246-261, 56 L. Ed. 1074;
Swift v. McPherson, 232 U. S. 51-55, 58 L. Ed. 499;
Cumberland Glass Mfg. Co. v. Charles DeWitt, 237 U. S. 447-449, 59 L. Ed. 1042;
Donohue v. Vosper, 243 U. S. 59-66, 61 L. Ed. 592.

III

Statement of the Case

This has already been stated in the preceding petition under I, of petition which is hereby adopted and made a part of this brief.

IV

Specification of Errors

1. The Supreme Court of Idaho erred in holding that the District Court of Cassia County did not err in denying the motion made prior to trial on May 14, 1941, by appellant (petitioner herein) as follows:

“Comes now the defendant (petitioner herein) and moves that an order be entered herein directing that the North Side Canal Company, * * * and American Falls Reservoir District No. 2 * * * be brought in as additional parties defendant, * * *” (R. 58-59).

for the reason that under the decree of the United States District Court for the District of Idaho, dated December 29, 1915, and March 25, 1919, Petitioner's Exhibits “A” and “B” attached to the Answer, quoted from at length in the opinion of the Supreme Court of Idaho (R. 58-63)

any change in the depth of the water of Milner Lake to less than 11 feet above the sills of the waste-gates of Milner Dam adversely affects the North Side Canal Company, Limited, a corporation, and American Falls Reservoir District No. 2, an irrigation district, who are the owners of an undivided 5/11ths interest in Milner Dam and rights-of-way for flowage of Milner Lake and require that the water be held in excess of a depth of 10.3 feet above the sills of the waste-gates of Milner Dam in order to permit sufficient water to flow into the diversion or intake gates for the North Side canal system; and to enjoin appellant (petitioner herein) from holding the water at or about the 11 foot level in this action, grants a permanent injunction in an action wherein the Court did not have jurisdiction of the parties in interest or subject matter in controversy and the judgment of the Supreme Court of Idaho is therefore subject to reversal by this Court.

2. In affirming the Judgment of the District Court of Cassia County.

V

Summary of Argument

(Point A.) The basis of respondents' cause of action for injunction against petitioner herein is the Federal decree dated December 29, 1915, and March 25, 1919, Petitioner's Exhibits "A" and "B" annexed to the Answer. This fact first appears in the amended complaint

" * * * defendant, Twin Falls Canal Company, is the owner of an undivided 6/11ths interest in and to * * * Milner Dam * * * (R. 3).

" * * * defendant * * * is wholly burdened with and has exclusive control, management and operation of the said Milner Dam * * * used * * * as a diversion dam from which the irrigation waters of the defendant and other irrigation users are drawn for

delivery to ultimate users; * * * that the defendant is wholly burdened with and has the exclusive control, management and operation of said Milner Lake in connection with said operation and use of said Milner Dam * * * (R. 4)."

Répondents in the course of their case to sustain their right of recovery against petitioner introduced in evidence as their Exhibit "K" a copy of the Federal decree, Petitioner's Exhibit "A" annexed to the Answer (R. 45).

The Supreme Court of Idaho in reviewing the judgment of the District Court of Cassia County states the facts as above set forth from the amended complaint (R. 56-58); and continues with a recital of facts as alleged in relation to the Federal decree in the first affirmative defense of petitioner (R. 58); then quotes petitioner's motion to bring in additional parties defendants which was denied and assigned as error (R. 59).

In discussing the assignment of error it is stated:

"The court found in its finding of fact VII:

'That the defendant, Twin Falls Canal Company, a corporation, is wholly burdened with and has the exclusive control, management and operation of said Milner Dam; * * *, is wholly burdened with and has exclusive control, management and operation of said Milner Lake in connection with the said operation and use of said Milner Dam,'

"The court's finding is predicated upon the record and particularly upon a decree made and entered by the Judge of the United States District Court, December 29, 1915, in an action wherein Twin Falls Canal Company, a corporation, was plaintiff, and Twin Falls Land and Water Company, a corporation, Twin Falls North Side Land and Water Company, a corporation, and North Side Canal Company, a corporation, were defendants. Among other

things said decree provides:" (This is followed by extensive quotations from the Federal decree (R. 58-61).

And the Court continues:

"The North Side Canal Company was required to pay to the Twin Falls Canal Company its proportionate share of the cost or expense incurred by said Twin Falls Canal Company in carrying out the provisions contained in the Federal decree, the Twin Falls Canal Company being wholly burdened with the control, management and operation of said Milner Dam and Milner Lake.

"The trial court did not err in denying the motion heretofore referred to."

Thus we find that the Supreme Court of Idaho bases its decision and opinion on its construction of the Federal decree and holds against petitioner who pleads the decree in support of its first affirmative defense.

In this situation this Court has said:

Donohue v. Vosper, 243 U. S. 59-66, at page 64,

"The decree, therefore, was made an element in the decision against plaintiff, and it was claimed by him to be an element in his favor. The motion to dismiss is therefore denied."

Also *Stoll v. Gottlieb*, 305 U. S. 165, 177, at page 167,

"As the contention is that the rule below disregarded decrees of a Court of the United States, it raised a Federal question reviewable under Sec. 237 (b) of the Judicial Code (28 U. S. C. A., Sec. 344(b))."

(Point B.) A Federal question of substance was decided by the Supreme Court of Idaho as to indispensable parties in favor of respondents herein by holding that the Federal decree, Petitioner's Exhibits "A" and "B" annexed to the Answer, which determines the ownership and

rights in Milner Dam and Milner Lake to be an undivided 6/11ths interest in petitioner and an undivided 5/11ths interest in the North Side Canal Company and American Falls Reservoir District No. 2, does not require respondents to join as parties defendant in this action the said North Side Canal Company and American Falls Reservoir District No. 2, but permits respondents to obtain a final decree enjoining petitioner herein from holding the water in the dam at or about 11 feet above the sills of the waste-gates, as required by the Federal decree, and which is for the benefit of the users of water under the North Side canal system.

The rule is announced in *Shields v. Barrow*, 58 U. S. 130, 17 How. 130, that a Court of equity cannot make a final decree until all parties essential to the merits of the question are brought in; and that persons having rights which must be affected by the decree cannot be dispensed with.

And in *Commonwealth Trust Co. of Pittsburgh v. Smith*, 266 U. S. 152 at page 159

"* * * But, as the bill was dismissed because of the refusal to bring in additional parties, the only question open here is whether the parties indicated are necessary parties; of course they were, if they had such an interest in the matter in the controversy that it could not be determined without either affecting that interest or leaving the interest of those who were before the Court in a situation that might be embarrassing and inconsistent with equity. *Shields v. Barrow*, 17 How. 130, 139, 15 L. Ed. 158, 160."

Again in *Garzot v. De Rubio*, 209 U. S. 283-306, the Court in considering whether the necessary parties were before the Court below to authorize it to make the decree at page 297 has this to say:

"Our duty in the matter was thus stated in *Minnesota v. Northern Securities Co.* 184 U. S. 199, 235, 46 L. Ed. 499, 515, 22 Sup. Ct. Rep. 308, 322:

“ ‘The established practice of Courts of equity to dismiss the plaintiff’s bill if it appears that to grant the relief prayed for would injuriously affect persons materially interested in the subject matter who are not made parties to the suit is founded upon clear reasons, and may be enforced by the Court, sua sponte, though not raised by the pleadings or suggested by the counsel. *Shields v. Barrow*, 17 How. 130, 15 L. Ed. 158; *Hipp v. Babin*, 19 How. 271, 278, 15 L. Ed. 633, 635; *Parker v. Winnipiseogee Lake Cotton & Woolen Co.* 2 Black, 545, 17 L. Ed. 333.’ ”

Also *Caldwell v. Taggart*, 29 U. S. 190, 4 Pet. 190, 7 L. Ed. 828, the general rule is “that however numerous the persons interested in the subject of a suit, they must all be made parties plaintiff or defendant in order that a complete decree may be made * * *.”

The applicable Idaho statutes as to parties defendant are Sec. 5-313 Idaho Code Annotated, 1932:

“Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein. And in an action to determine the title or right of possession to real property which, at the time of the commencement of the action, is in the possession of a tenant, the landlord may be joined as a party defendant.”

and Sec. 5-324 Idaho Code Annotated, 1932:

“The court may determine any controversy between parties before it when it can be done without prejudice to the rights of others, or by waiving their rights; but when a complete determination of the controversy can not be had without the presence of other parties the court must then order them to be brought in, and to that end may order amended and supplemental pleadings, or a cross-complaint to be filed and summons thereon to be issued and served. And when, in an action

for the recovery of real or personal property, or to determine conflicting claims thereto, a person, not a party to the action, but having an interest in the subject thereof, makes application to the court to be made a party, it may order him to be brought in as in other cases."

Provisions similar to those of Sec. 5-313 I. C. A. above, are referred to in 47 Corpus Juris, p. 72 where it is stated that this provision is not in derogation of the equity rule that all persons interested should be made parties to avoid a multiplicity of suits.

In referring to the above statutes, the Supreme Court of Idaho has held where it appears either from the pleadings or proof that a complete determination of the rights of all the parties can not be made without making other persons parties it is the duty of the court to order such persons brought in, and should permit the defendant to file a cross bill for that purpose, *First National Bank of Hailey v. Bews et al.*, 3 Idaho 486, 31 P. 816.

Also in reference to what the legislature intended by Sec. 5-313, I. C. A., it is said:

"What it did intend by the enactment of Sec. 5-313, supra was simply this: That any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff or who is a necessary party to a complete determination or settlement of the question involved therein, either where only one cause of action is alleged in the complaint, or where two or more causes are alleged, and that all fall within and belong to the classifications mentioned in Sec. 5-606, supra, * * * " *Stearns v. Graves*, 61 Idaho 232, 99 Pac. (2d) 955, quoting from page 243 of the Idaho report.

The importance of the Federal question involved as being one of substance is at once apparent, when we con-

sider the monumental development work now being carried on in the arid West, for the multiple use of the water resources of that section of the Nation for irrigation flood control, power and navigation. A pronouncement by this Court upon the important question of procedure as to indispensable parties in actions involving the use of dams in the rivers of the West for irrigation, flood control, power and navigation will tend to greatly reduce and expedite future litigation and will remove the present decision as a precedent, that an injunction may be granted in a State Court contrary to Federal decree without bringing into the case additional parties defendant, who have property interests in a dam and lake established by a Federal decree.

Point A

Petitioner's motion filed prior to trial in the District Court requesting that the North Side Canal Company, Limited, and the American Falls Reservoir District No. 2 be brought in as additional parties defendant (R. 58), denied by the trial court and sustained by the Supreme Court of Idaho (R. 62) was based upon the Federal decree Exhibits "A" and "B" attached to the Answer and made a part of the first affirmative defense.

The Supreme Court of Idaho quotes relevant paragraphs of the Federal decree Exhibits "A" and "B" and decides that under this Federal decree the trial court did not err in denying petitioner's motion to bring in the additional parties defendant although it is conceded that the additional parties defendant owned an undivided 5/11ths interest in the Dam and rights-of-way for flowage of Milner Lake. Thus the Federal decree was made an element in the decision against petitioner and it was claimed by petitioner to be an element in its favor.

In the light of past decisions, this Court will not refuse to exercise its jurisdiction to review the decision of the

Supreme Court of the State of Idaho under 28 U. S. C. A. Sec. 344(b), *Donahue v. Vosper* and *Stoll v. Gottlieb*, *supra*; also *Dupasseur v. Rochereau*, 88 U. S. 130-138, where it is held when in a case in a State Court a right or immunity is set up under and by virtue of a judgment of a Court of the United States and the decision is against such right or immunity, a case is presented for removal and review by writ of error to the Supreme Court of the United States; and *Crescent City L. S. L. & S. H. Co. v. Butchers' Union et al.*, 120 U. S. 141, whether a State Court has given due effect to a decree or judgment of a Court of the United States is a question arising under the Constitution and laws of the United States within the jurisdiction of the Federal Courts. To the same effect *Des Moines Nav. & R. Co. v. Iowa Homestead Co.*, 123 U. S. 552; *Pittsburgh, C., C. & St. L. R. Co. v. Long Island Loan & T. Co.*, 172 U. S. 493; *Motlow v. Missouri*, 295 U. S. 97, 98; *West Side Belt R. R. Co. et al. v. Pittsburgh Const. Co.*, 219 U. S. 92-100; *Cresswill v. Grand Lodge Knights of Pythias of Ga. et al.*, 225 U. S. 246-261; *Swift v. McPherson*, 232 U. S. 51-55; and *Cumberland Glass Mfg. Co. v. Charles DeWitt*, 237 U. S. 447-449.

Point B

The Federal question of substance was decided by the Supreme Court of Idaho as to the effect of the Federal decree in question Exhibits "A" and "B" attached to the Answer, clearly against the language, purpose and intent of the decree which decision is not in accord with the decisions of this Court.

It is true that the Supreme Court of Idaho quotes extensively from the Federal decree (R. 59-61). However in quoting from paragraph 5 of the decree (R. 60), the quotation ends with a recital of the management and control of the dam which is vested in petitioner but fails to

take into account the further provision of the decree in that paragraph which reads as follows:

“* * *, but the supervision and control of the said Twin Falls Canal Company shall not extend to the diversion or intake gates for the North Side system.
* * * (R. 47).

When this provision is considered in connection with paragraph 8 of the decree (R. 48) whereby the Court retains jurisdiction to direct the height at which water shall be held in said Dam and further as modified and amended, Exhibit “B” attached to the answer (R. 48-49) from which we quote:

“This cause came on to be heard on this the 25th day of March, 1919, during the regular February 1919 term of this court, upon the petition of the Twin Falls North Side Land and Water Company, and the North Side Canal Company, Ltd., two of the defendants above named, wherein such defendants pray that the water in the Forebay of the Milner Dam in Snake River be by the plaintiff above named, maintained and kept at the eleven foot gauge height and that a certain decree of this court made and entered in the above entitled cause on the 28th day of December, 1915, be amended so as to require the plaintiff above named to so maintain said water at said gauge height, and evidence having been duly taken and submitted and the court being fully advised in the premises, it is hereby ordered, adjudged and decreed as follows:

“1. That during the irrigation season in each year hereafter, the water in the forebay of the Milner Dam shall be held and kept at or about the depth of eleven feet above the sills of the waste gates, so long as the same may be necessary or required by either of said Canal Companies, and in the case of the North Side Canal Company, Limited, it is hereby required to give two days written notice during each irrigation season, of the period during which it will require said dam to

be so operated as to afford such depth of water; Provided, that should danger appear imminent to said dam, or any of its appurtenant structures then either party may require the operation of said dam to be so regulated as to relieve such danger until the cause is remedied or removed, and in the event the said parties are unable to agree as to the manner of such operation or the method of removing such danger, then the same shall be forthwith brought to the attention of the court for such action as to it may appear necessary.

"2. That that certain decree entered in the above entitled cause on the 29th day of December, 1915, be and the same is hereby modified and amended as herein indicated, and as above set forth.

"Done in open court this 25th day of March, 1919.
F. S. Dietrich Judge."

it will be observed that the Twin Falls Canal Company, plaintiff in that action (petitioner herein) has no supervision or control over the diversion or intake gates for the North Side system.

The North Side Canal Company and American Falls Reservoir District No. 2 own an undivided 5/11ths interest in the dam and rights-of-way for the lake. They have exclusive supervision and control over their own diversion works; their projects are entirely separate and apart from the project on the South Side of the River operated by petitioner; they know when the needs of the lands for irrigation on the North Side of the River require that the water in the Forebay of Milner Dam shall be held at a depth of 11 feet above the sills of the waste-gates; petitioner herein has no knowledge of that fact and nothing to do with the irrigation of the lands on the North Side of Snake River. It is stated in the modification and amendment in part as follows:

"This cause came on to be heard on this the 25th day of March, 1919, during the regular February-1919 term of this court, upon the petition of the Twin Falls

North Side Land and Water Company, and the North Side Canal Company, Ltd., two of the defendants above named, wherein such defendants pray that the water in the Forebay of the Milner Dam in Snake River be by the plaintiff above named, maintained and kept at the eleven foot gauge height and that a certain decree of this court made and entered in the above entitled cause on the 28th day of December, 1915, be amended so as to require the plaintiff above named to so maintain said water at said gauge height, * * *

and further

"* * *, and in the case of the North Side Canal Company, Limited, it is hereby required to give two days written notice during each irrigation season, of the period during which it will require said dam to be so operated as to afford such depth of water; Provided that should danger appear imminent to said dam, or any of its appurtenant structure then either party may require the operation of said dam to be so regulated as to relieve such danger until the cause is remedied or removed, * * * (R. 49).

The purpose and effect of the litigation in the United States District Court for the District of Idaho which resulted in the decree Exhibits "A" and "B" annexed to the Answer, appear upon the face of that decree and may be summarized as follows:

A. Suit was brought by the Twin Falls Canal Company, plaintiff therein (petitioner herein) against Twin Falls Land and Water Company, a corporation which constructed the South Side canal system, and the Twin Falls North Side Land and Water Company, a corporation, which constructed the North Side canal system, and the North Side Canal Company, a corporation, which is the operating company of the North Side canal system.

B. Suit was brought to reform a deed which the construction company, Twin Falls Land and Water Company, had executed to the Twin Falls Canal Company conveying the South Side Canal system with reservations, which deed was dated November 30, 1909 and recorded in Book 14 of Deeds, page 15, records of Twin Falls County, Idaho, and to determine the ownership of Milner Dam in Snake River which had been constructed by the said Twin Falls Land and Water Company.

C. The decree requires the Twin Falls Land and Water Company to execute and deliver to plaintiff a good and sufficient deed of conveyance without the reservations which were contained in the former deed.

D. As to the ownership of the Dam, it was decreed that the Twin Falls Land and Water Company should execute and deliver a good and sufficient deed of conveyance to the Twin Falls Canal Company an undivided interest in the Milner Dam on Snake River and shall likewise execute and deliver to the North Side Canal Company an undivided interest in said Milner Dam, the said interests to be conveyed to be on the basis of 6/11ths to the said Twin Falls Canal Company and 5/11ths to the North Side Canal Company and their respective rights of 6/11ths and 5/11ths are quieted and confirmed.

E. It is further adjudged and decreed that the right to use said dam for the purpose of checking and impounding the water flowing in Snake River be expressly recognized and confirmed and that the Dam shall be forever held, owned and used by said companies for such purpose.

F. It is furthermore ordered, adjudged and decreed that the exclusive management and control of the Dam be and the same is hereby vested and placed in the Twin Falls Canal Company; such control and management to be in

furtherance of the joint use and the Twin Falls Canal Company shall be responsible for the proper maintenance and safeguarding of the Dam; the measure of responsibility being reasonable care and diligence in view of the nature of the structure, its use and the dangers thereto reasonably to be anticipated, *but the supervision and control of the said Canal Company shall not extend to the diversion or intake gates for the North Side system.*

G. The Twin Falls Canal Company shall incur reasonable expense necessary for or incident to maintaining and safeguarding the Dam, the expense to be borne by the Twin Falls Canal Company and the North Side Canal Company in proportion to the aggregate number of water rights sold or owned by the water users under each of said systems.

H. The North Side Canal Company shall pay \$500 a year to the Twin Falls Canal Company for its supervision and responsibility in connection with the management and control of the Dam.

I. The Court retains jurisdiction for the purpose of modifying the decree relative to enlargement, control and management, alterations, repairs or maintenance of said dam in case the plaintiff fails to make or permit any such alterations or repairs; and also jurisdiction to direct the height at which the water shall be held in the Dam.

This decree was intended to be a simple adjudication requiring the construction company to execute a deed to the Twin Falls Canal Company for the South Side canal system without reservations; to establish the rights of the Twin Falls Canal Company on the South Side of the River, and the North Side Canal Company on the North Side of the River, to the use of Milner Dam; to place the management and control of the Dam in responsible hands, requiring

the exercise of reasonable care and diligence in maintaining and safeguarding the Dam having in view the nature of the structure, its use and the dangers reasonably to be anticipated; however, with no control over the diversion or intake gates of the North Side canal system.

Upon petition of the Twin Falls North Side Land and Water Company, the company which constructed the project on the North Side of the River, and the North Side Canal Company, Limited, the operating company, praying that the water in the Forebay of Milner Dam in Snake River be by the plaintiff named in said action (petitioner herein) maintained and kept at the 11 foot gauge height and that the decree, petitioner's Exhibit "A" annexed to the Answer, be amended so as to require the plaintiff (petitioner herein) to maintain said water at said gauge height, the decree was modified and amended under date March 25, 1919, requiring the water in the Forebay of Milner Dam to be held at or about the depth of 11 feet above the sills of the waste-gates.

The management and control of Milner Dam vested in the Twin Falls Canal Company (petitioner herein) in the light of all the facts and circumstances surrounding the construction of the projects, the ownership of the Dam and its use under the decree, can only mean the management and control of the physical property as to repairs, to prevent leaks, erosions, damage or destruction by the elements, etc. In the very nature of the rights of the respective parties, it was necessary for the United States district Court to fix this responsibility in some one and it was placed with the Twin Falls Canal Company. It was never thought that the Twin Falls Canal Company by accepting this responsibility would assume a responsibility to third parties for raising the water in the Forebay of Milner Dam which was done by amending the decree upon petition of the

Twin Falls North Side Land and Water Company and the North Side Canal Company, Limited.

By accepting the responsibility of the maintenance and operation of the Dam, petitioner herein is required by mandortory injunction in the decree to hold the water level in the Forebay of Milner Dam at a depth of 11 feet above the sills of the waste-gates. Under the injunction herein, petitioner is enjoined from maintaining the lake level at that elevation because to do so will cause the water of Milner Lake to wash upon and over and erode and wash away respondents' lands. Petitioner cannot comply with both decrees at the same time.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers by granting a Writ of Certiorari and thereafter reviewing and reversing said decision.

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